United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2453

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P/B

To be argued by
JOHN R. WING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2453

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES CARFORA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN R. WING,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

James Carfora appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on October 22, 1974 after a three day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 74 Cr. 755, filed on July 23, 1974, charged the defendant Carfora with endeavoring to obstruct justice by threatening the life of an Assistant United States Attorney in violation of Title 18, United States Code, Section 1503.

Trial commenced on October 4, 1974 and concluded on October 8, 1974, when the jury returned a verdict of guilty. On October 22, 1974, Judge Weinfeld sentenced the defendant to a one year term of imprisonment to run consecutively to a prison term he was then serving for

mail fraud. Judge Weinfeld also denied Carfora's application for bail pending appeal on the ground that he was a danger to the community. On November 19, 1974, this Court affirmed that ruling and the defendant is presently incarcerated.

Statement of Facts

In an attempt to avoid a jail sentence for mail fraud, the defendant Carfora telephoned the Assistant United States Attorney in charge of his case and threatened her life if anything happened to him on the date scheduled for his surrender. The jury rejected Carfora's claim that he did not make the call after numerous rebuttal witnesses proved the falsity of his alibi defense.

A. The Government's Case

In November, 1970, Assistant United States Attorney Shirah Neiman was assigned to investigate and prosecute a mail fraud case against Carfora. Carfora was subsequently indicted and convicted after a four day trial on nine counts of mail fraud. In March, 1972, Judge Gurfein suspended the imposition of sentence and placed Carfora on probation for two years with the condition that the defendant make full restitution to victims of his fraud (T. 18-20, GX 1).*

Shortly thereafter, the United States Probation Office filed charges against Carfora for violating conditions of his probation. On May 14, 1973, after lengthy hearings, Judge Gurfein revoked the defendant's probation and imposed a four month jail sentence to be followed by two years of probation, also conditioned on the defendant's making restitution to the victims of his fraud. On Nov-

*"T." refers to the trial transcript; "PT" refers to the transcript of a pre-trial hearing on August 20, 1974; "GX" refers to Government Exhibits; "Br." to appellant's brief.

ember 21, 1973 this Court affirmed Judge Gurfein's ruling, *United States* v. *Carfora,* 489 F.2d 354, and on May 28, 1974, the United States Supreme Court denied Carfora's petition for a writ of *certiorari* (T. 20-21).

At that point, the defendant moved before Judge Gurfein for reconsideration of the decision revoking his probation or, in the alternative, for a reduction of his sentence. On July 12, 1974, Judge Gurfein denied all motions and ordered Carfora to surrender on August 1, 1974 (T. 21).

Throughout this 3½ year period Assistant United States Attorney Shirah Neiman, represented the Government in every aspect of the Carfora case except the appeal. During the course of these proceedings, she had heard the defendant's voice on numerous occasions in court and had received at least eighteen telephone calls from him involving conversations of varying lengths (T. 22-28).

On the evening of Saturday, July 20, 1974, ten days before Carfora was scheduled to surrender, Shirah Neiman was alone in her apartment on the upper west side of Manhattan. At approximately 7:45 p.m. her telephone began to ring. She picked up the phone and said, "Hello." The voice at the other end replied, "If anything happens to Carfora on the 1st you're dead." The caller then hung up. Miss Neiman immediately recognized the defendant Carfora's voice. After recording Carfora's sinister message on an index card, she telephoned Thomas D. Edwards, Chief of the Criminal Division in the United States Attorney's Office, and advised him of what had happened. Later that night, United States Postal Inspector, John Slavinski attempted to arrest Carfora for obstruction of justice, but was unable to locate the defendant at his residence (T. 28-32, 288, 296).

Miss Neiman understood Carfora's call to mean, "If I didn't do something about not—about making sure that he did not have to begin serving his prison sentence on August 1 . . . that he would harm me seriously. . . . I tried not to think about killing but I thought of a lot of other bad things. . . . I kept on thinking that he was going to throw acid in my face as I left my apartment and every time I walked out of the apartment door from the time, from the day of the threat until he surrendered I would very carefully open up the door and I don't think it would have done much good but kind of peek out into the hallway to see if Mr. Carfora was standing there and for some reason that is the thing that kept on entering my mind in terms of what kind of things he might try to do" (T. 118-21).

Carfora's death threat was unsuccessful because after receiving the call Miss Neiman did absolutely nothing to influence, obstruct or impede the surrender proceeding or the jail sentence. She testified, however, that if she had been so inclined she could have used her position as the Assistant United States Attorney in charge of Carfora's case to effectively short-circuit the surrender proceeding by marking the case off the court calendar indefinitely or by joining or consenting to an application to reduce the sentence or adjourn the surrender (T. 36, 105-106).

B. The Defendant's Case

The defense presented a detailed alibi through the testimony of Carfora and three friends from his apartment building, including Peter Choras, the landlord, and Tibor and Joseph Hobler, two teenage boys whose mother was the building superintendent. Both Choras and Mrs. Hobler were sufficiently close to Carfora to have communicated with him while he was in jail on the mail fraud charge, and they even made the trip to the Federal House of Detention at West Street to visit him (T. 137-38, 189).

When Miss Neiman received the telephonic death threat, she had noted the time of the call as 7:45 p.m. The defendant and his three witnesses all testified that they had dinner together in Carfora's apartment from seven to eight on the night in question and that Carfora neither made nor received any call from any of the six phones in his apartment during that time. One week prior to the trial Choras said that he had left Carfora's apartment that night "some time between 7:30 and 8", but at the trial he was positive about leaving "after 8" (T. 132-35, 147-48, 185-87, 202, 225-27, 255-57).

The defendant Carfora and the two Hobler boys were equally positive that no one left before 8:00 that night because they were watching a particular television program called "Mod Squad" which was an hour long show running from 7:00 until 8:00 (T. 272, 194, 205, 231, 235, 236). Tibor Hobler testified, "I remember I finished watching this T.V. program which was named the Mod Squad and that finishes at 8:00 and I was watching it from the dinner table" (T. 194).

The Hobler boys also testified that immediately prior to dinner that Saturday night Tibor had been playing for the St. George's soccer team in a game at Van Cortland Park. All the defense witnesses testified that after the dinner the two boys had gone to a dance at the Church of Our Lady of Guadalupe across the street. Joseph Hobler described the dance as an affair run by the church "once every two months or so" which cost $1.50 per person to attend (T. 240-41).

According to Choras, the defendant Carfora left to play cards in New Jersey about 11:00 that evening. However, he was contradicted by Carfora who claimed that he had played cards that evening on east 73rd Street in Manhattan with people whom he didn't "care to name" (T. 162, 262).

Although Choras and the Hoblers admitted talking to Postal Inspector Slavinski later that night about Carfora's whereabouts, they all denied telling Slavinski that they had not seen Carfora since that morning (T. 163-64, 215,244).

C. Government Rebuttal

The Government called eight rebuttal witnesses. An executive secretary to the Vice-President in charge of programming at WPIX testified and produced documents to establish that "Mod Squad", which was an exclusive WPIX show, was not televised on Saturday evening July 20 between 7:00 and 8:00 or at any other time that night (T. 378-384).

George Bacon, the coach of Tibor Hobler's soccer team, testified that the team played no games in July because the soccer season ended in May (T. 283-84). Frank Lopez, a member of the same soccer team testified that Tibor Hobler had admitted lying about the soccer game when the two boys discussed the matter the night after Hobler testified (T. 342-344).

The only dance taking place in the Church of Our Lady of Guadalupe the night of July 20 was the wedding party of Lucy and Luis Perez who had definitely not invited Tibor or Joseph Hobler to their wedding party because they did not even know them. This testimony was confirmed by the Reverend Dennis Cornelisse who lived in the church, knew the Hobler boys by sight and did not see them at the wedding party that evening (T. 336-337).

Two United States Postal Inspectors, John Slavinski and Dennis Kellerher, testified about their efforts to locate and arrest Carfora at his residence the night the death threat was made. When Slavinski arrived at Carfora's building shortly after 11:00 p.m., he asked Tibor Hobler "whether he had seen Mr. Carfora during that day, and he

related to me that he saw him in the morning but hadn't seen him since" (T. 290). Choras and Joséph Hobler replied in kind when Slavinski questioned them on that point (T. 291-292). Inspector Kelleher, corroborated the fact that either Tibor Hobler or Choras told Slavinski that "they had not seen Mr. Carfora since earlier that day, that morning" (T. 316). On that night of July 20, none of the three alibi witnesses told Slavinski that they had had dinner with Carfora that evening or that he had gone to play cards in New Jersey.

Inspectors Slavinski and Kelleher were unable to locate Carfora that night although they maintained a surveiilance on his apartment until 4:00 a.m. the next morning (T. 292-293).

ARGUMENT

POINT I

An attempt to obstruct a surrender proceeding by threatening to kill the prosecutor is clearly an obstruction of justice within section 1503.

Carfora seeks reversal of his conviction on the ground that his threat to kill the prosecutor in his case, uttered shortly before his scheduled surrender, did not constitute an endeavor to obstruct justice within the meaning of 18 U.S.C. § 1503. Appellant's theory is that his criminal case had been completed except for the surrender and that therefore a judicial proceeding was no longer "pending" on the date the threat was made. Judge Weinfeld properly rejected this claim below (PT 2-10; T. 124) and appellant offers neither authority nor reason to demonstrate that the ruling was error.

It is clear from the proof at trial that on the date of the threat the ultimate event in the administration of crim-

inal justice was still pending. The surrender of a defendant in a criminal case is equivalent to the satisfaction of a judgment. The event is given judicial import by being noticed for the criminal calendar and is obviously pending in that sense.* Defendant's claim that the surrender "is a purely ministerial act that does not occur in a courtroom" (Br. 9) is contrary to well established practice in the Southern District and the express direction of Judge Gurfein in this case (T. 104-05).

The defendant's threat, "if anything happens to Carfora on the 1st, you're dead" was specifically directed at the surrender proceeding scheduled for August 1. The meaning was unmistakably clear, as Miss Neiman testified: "If I didn't do something about not . . . about making sure he did not have to begin serving his prison sentence on August 1 . . . that he would harm me seriously" (T. 118). If Miss Neiman had succumbed to the fear intended by the threat, she easily could have deferred or defeated Carfora's surrender obligation. As the Assistant United States Attorney handling a matter noticed for surrender, she could have marked the case off the calendar, refrained from requesting a bench warrant if the defendant had not appeared, or initiated or consented to any application for a reduction of sentence or delay in surrender.

Defendant argues that because Judge Gurfein had already denied a prior application for a reduction of sentence or adjournment of the surrender, the possibility of similar motions "was so totally theoretical as to be devoid of any reality" (Br. 9). No judge in this courthouse could agree with that assertion. In response to this same argument, Judge Weinfeld noted that in his common experience such

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* Similarly, deportation proceedings remain pending until the immigrant is actually deported, and an effort to influence that occurrence is an obstruction of justice. *Becharias* v. *United States*, 208 Fed. 143 (7th Cir. 1913).

motion "are repeatedly made on such cases" (PT 8). Miss Neiman confirmed that in her four years experience as an Assistant United States Attorney defendants had filed more than one motion to reduce "very frequently" (T. 106). Indeed, the defendant's track record in the underlying mail fraud case indicates an obvious disposition to litigate at every possible opportunity any issue that might enable him to avoid the ultimate consequence of his criminal acts.

In the context of this case the event of Carfora's surrender was a judicial proceeding, the obstruction of which would clearly constitute interference with the due administration of justice. These facts are apparent from the proof at trial which established the context of defendant's threat in terms of his surrender date. That proof is more than sufficient to establish the violation of the obstruction of justice statute for which he was convicted.

The defendant also argues that the obstruction of justice statute was not designed to protect prosecutors and therefore is not applicable to the facts in this case. Although the position of "Assistant United States Attorney" is not specifically listed among the parties enumerated as "protected" by the first portion of the statute,* a persuasive

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* 18 U.S.C. § 1503: Influencing or injuring officer, juror or witness generally. Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such

[Footnote continued on following page]

argument can be made that an Assistant United States Attorney is protected by that portion of Section 1503 because he or she is an "officer in or of any court of the United States." See *United States* v. *Polakoff,* 112 F.2d 888, 890 (2d Cir.), *cert. denied,* 311 U.S. 653 (1940). However, this Court need not reach that question because the indictment in this case is not drawn under that portion of the statute. Rather, the defendant was convicted for a violation of the second, or "omnibus" provision, which proscribes any obstruction or an endeavor to obstruct the "due administration of justice."

> "This latter provision, under which the defendant has been indicted, is all-embracing and designed to meet any corrupt endeavor to obstruct or interfere with the due administration of justice." *United States* v. *Solow,* 138 F. Supp. 812, 816 (S.D.N.Y. 1956).

See also *United States* v. *McLeod,* 119 Fed. 416, 418 (C.C.N.D. Ala. 1902):

> "Justice is administered, in the sense of this statute, only by bringing rights or wrongs, and the persons or things concerned in them, before a judicial tribunal, and there dealing with each particular case as it arises. Every instrumentality or power, the exercise of which is proper or necessary to the accomplishment of any of these ends, is part and

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grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> parcel of 'the due administration of justice.' Every unlawful act, specified in the statute, which interferes with or obstructs the normal and proper operation of any of the instrumentalities or powers which the law provides for bringing a matter before a judicial tribunal, deciding it after it is there, and enforcing the judgment rendered, constitutes, as to such matter, either an impediment or an obstruction, or an endeavor to obstruct or impede, 'the due administration of justice,' within the meaning of the statute."

As this Court long ago recognized an attempt to improperly influence a prosecutor in the course of his official duties "would be a very successful way of impeding and obstructing the judge himself." *United States* v. *Polakoff, supra,* 112 F.2d at 890. In *Polakoff* this Court sustained the sufficiency of an indictment charging a conspiracy to obstruct justice based on an improper attempt to influence the prosecutor's sentencing recommendation. Thus, obstruction of justice need not be alleged under the enumerated offenses in the first portion of Section 1503, and the defendant's acts need not necessarily relate to one of the parties specified therein. *United States* v. *Rosner,* 352 F. Supp. 915, 918 (S.D.N.Y. 1972), *aff'd,* 485 F.2d 1213 (2d Cir. 1973), *cert. denied,* 42 U.S.L.W. 3679 (1974).

The defendant argues that by application of the principle of *ejusdem generis,* the omnibus provision must read in the context of the first portion of the statute. That argument has been expressly rejected in this Circuit. In *United States* v. *Alo,* 439 F.2d 751, 754 (2d Cir.), *cert. denied,* 404 U.S. 850 (1971), this Court held that the similar omnibus provision in Section 1505, relating to administrative proceedings, was to be interpreted separately from the section which listed specific violations. In *United States* v. *Cohn,* 452 F.2d 881, 883-84 (2d Cir. 1971),

cert. denied, 405 U.S. 975 (1972), this Court reaffirmed that holding and extended it to the omnibus provision of Section 1503. *See United States* v. *Rosner, supra.*

There can be no doubt that the omnibus provision of Section 1503 may be violated by communicating a threat to kill an Assistant United States Attorney in connection with a duly ordered surrender date. If, as a result of the threat, Carfora's sentence had been reduced to probation on the Government's motion, it would surely constitute an obstruction of the due administration of justice. *United States* v. *Solow, supra.* The evidence in this case amply proved an attempt to obstruct justice prohibited by 18 U.S.C. § 1503.

POINT II

Judge Weinfeld's ruling permitting the Government to cross-examine Carfora about a 1965 conviction for attempted grand larceny was clearly proper.

Carfora contends that Judge Weinfeld abused his discretion in allowing the Government to cross-examine him about his 1965 felony conviction for attempted grand larceny (T. 246-47, 258). The defendant argues that the age of his conviction substantially impaired its probative value and allowing it to be used to impeach his credibility gave the Government an "undue advantage", because the trial became a contest "between a government prosecutor (Miss Neiman) and a convicted defendant" (Br. at 13). The argument is devoid of factual or legal support.

Initially, it should be noted that the defendant's 1972 conviction for mail fraud also was before the jury and therefore his credibility as a "convicted defendant" would not have been altered to any great degree by concealing

this earlier conviction for attempted grand larceny. Actually the most telling impeachment of defendant's credibility came not from his prior convictions, but from the WPIX witness whose program records establishing that "Mod Squad" was not shown on the night in question demolished the cornerstone of Carfora's carefully detailed alibi.*

This Court has long recognized the propriety of impeaching credibility with convictions more aged than the nine year old larceny conviction used in the instant case. *United States* v. *Christophe,* 470 F.2d 865, 870 (2d Cir. 1972), *cert. denied* as *Pierro* v. *United States,* 411 U.S. 964 (1973) (twelve year old narcotics conviction); *United States* v. *DiLorenzo,* 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied,* 402 U.S. 950 (1971) (eighteen year old larceny and twenty year old forgery convictions); *United States* v. *Palumbo,* 401 F.2d 270 (2d Cir. 1968), *cert. denied,* 394 U.S. 947 (1969). (Armed robbery convictions in 1939 and 1956, breaking and entering convictions in 1937 and 1946 and a conviction for receiving stolen property in 1945). Carfora's nine year old conviction would be equally admissible under the newly enacted Federal Rules of Evidence for the United States Courts and Magistrates, Rule 609(b), which sets out a general ten year limitation to run from the date of conviction or release from confinement which ever is the later date, but which authorizes the use of even older convictions if advance notice is given of the intention to do so.

Moreover, a conviction for attempted grand larceny is considered highly probative of lack of veracity. As this Court has noted, "crimes which involve fraud or

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* Contrary to the defendant's assertions, the credibility issues in the case were not solely between Miss Neiman and Carfora but rather between all of the government's nine witnesses and all of the four witnesses called by the defense of whom Carfora was only one.

stealing reflect on honesty and integrity and thereby on credibility." *United States* v. *Puco,* 453 F.2d 539, 543 (2d Cir. 1971); *United States* v. *DiLorenzo, supra,* 429 F.2d at 220. In common experience acts of deceit, fraud, cheating or stealing for example are universally regarded as conduct which reflects adversely on a man's honesty and integrity. *Gordon* v. *United States,* 383 F.2d 936, 941 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029 (1968). Furthermore, the Federal Rules of Evidence specifically provide that a defendant's credibility may be impeached by proof of a prior conviction if the crime "involved dishonesty or false statement regardless of the punishment" and without any requirement that the probative value of admitting the evidence outweigh its prejudicial effect to the defendant. Under the circumstances, Judge Weinfeld's ruling was clearly proper.

POINT III

The Court's supplemental charge was proper.

Defendant contends that the supplemental *Allen* charge given by Judge Weinfeld constituted reversible error in the absence of specific language that the majority should listen to the minority. Similar claims were rejected by this Court in *United States* v. *Hynes,* 424 F.2d 754 (2d Cir.), *cert. denied,* 399 U.S. 933 (1970) and *United States* v. *Rao,* 394 F.2d 354 (2d Cir.), *cert. denied,* 393 U.S. 845 (1968), and the argument is without merit.

Following Judge Weinfeld's charge, the jury withdrew to the jury room to commence its deliberations at 10:45 A.M. on October 4, 1974. At 12:55 P.M. pursuant to a request of the jury Judge Weinfeld reread a portion of his charge on obstruction of justice and turned over certain exhibits. At 4:10 P.M., at the jury's request, Judge Weinfeld again reviewed his charge on obstruction of justice. At 5:15 P.M. the jury sent a note to Judge Weinfeld stating that "we have reached an impasse." At that point

Judge Weinfeld called the jury into the courtroom and gave the following instruction:

"It is desirable if a verdict can be reached that this be done from the viewpoint of the defendant and the government.

It is normal for jurors, upon initial consideration of matters, to have differences. This is quite common.

Also as I mentioned in my main charge, frequently jurors, after extended discussion, may find that a point of view which originally reflected a fair and considered judgment might well yield upon the basis of argument and reconsideration of the facts and the evidence.

I have no right to and do not inquire as to how you stand, but I do want to make a reference to a viewpoint expressed by the Supreme Court many years ago, and I'm quoting it:

'That although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen with a disposition to be convinced, to each other's arguments; that if the much larger number were for conviction a dissenting juror should consider whether his doubt was a reasonable one which made no impression' upon the mind of so many men'—this was written before the days of the women's lib movement, I suppose it would be men and women now—'that if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a

reasonable one which made no impression upon the minds of so many men equally honest, equally intelligent with himself. If upon the other hand the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.'

I emphasize that no juror must vote for any verdict unless after full discussion, consideration of the issues and exchange of views it does represent his or her considered judgment.

My own judgment is, based upon the testimony that was developed during this trial, that further consideration is warranted by the jurors and I am going to ask you to return for further deliberations."

Defense Counsel then requested an introduction "that the majority should listen to the minority in its deliberations." Judge Weinfeld responded "I am not going to alter the instruction" and defense counsel took an exception. After more than five hours of further deliberation the jury returned its guilty verdict at 10:55 P.M. (T. 478-489).

Defendant mistakenly asserts that the foregoing charge contained an instruction that "the majority need not listen to the minority" (Br. at 15). Judge Weinfeld gave no such instruction. Defendant argues that Judge Weinfeld's charge is "at odds" with the fundamental premise that each juror should listen carefully to the opinions of every other juror (Br. at 15). In fact, the jurors were specifically instructed to do just that in that part of the charge stating "they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; . . . that they should listen with a disposition to be convinced, to each other's arguments." This language also undercuts defendant's claim that only the minority jurors were instructed to reassess their views.

In his supplemental instruction Judge Weinfeld quoted directly from the Supreme Court decision in *Allen* v. *United States,* 164 U.S. 492, 509 (1896), which charge has consistently been approved by this Court to encourage a verdict in the face of an apparent deadlock, absent coercive circumstances * outside the charge itself. *United States* v. *Birrell,* 447 F.2d 1168, 1173 (2d Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972); *United States* v. *Bowles,* 428 F.2d 592, 595-96 (2d Cir.), *cert. denied,* 400 U.S. 928 (1970) (see cases cited therein at 595 n. 9). Moreover, Judge Weinfeld's closing statement that "no juror must vote for any verdict unless after full discussion, consideration of the issues and exchange of views it does represent his or her considered judgment" contained an added assurance, not present in the original *Allen* charge, that a juror was not expected in deference to other jurors to abandon his conscientious convictions. See *United States* v. *Kenner,* 354 F.2d 780, 783 (2d Cir. 1965), *cert. denied,* 383 U.S. 958 (1966).

Defendant argues that "this Court has yet to review a trial court's charge" similar to Judge Weinfeld's instructions in the instant case (Br. 15). To the contrary, an almost identical charge given by Judge Weinfeld in another case was reviewed and approved by this Court in *United States* v. *Hynes,* 424 F.2d 754 (2d Cir.), *cert. denied,* 399 U.S. 933 (1970). In *Hynes* the defendant argued, *inter alia,* that the charge encouraged the minority to re-examine its view in light of the majority position but did not emphasize that the majority should also examine its view.** In upholding Judge Weinfeld's supplementary charge in *Hynes* this Court observed that it "was couched in the fairest possible language, assuming the acceptability of the

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* None are alleged here because there were none.

** See the Government's Brief on Appeal at page 9 in *United States* v. *Hynes.*

deadlock-breaking procedure in its essence" and there was no "undue emphasis on the responsibility of the minority to suggest any coerciveness beyond the supplementary charge itself". *Id.* at 757. See also *United States* v. *Rao*, 394 F.2d 354, 356 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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JOHN R. WING,
LAWRENCE S. FELD,
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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

DANIEL L. FINEMAN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the **17th** day of **January, 1975** he served a copy of the within **Government's Brief** by placing the same in a properly postpaid franked envelope addressed:

ELLIOT H. WALES, ESQ.
747 Third Avenue Avenue
New York, New York 10017

And deponent further says that he sealed the said envelope and placed the same in the mail **chute** drop for mailing **within** the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

DANIEL L. FINEMAN

Sworn to before me this

17th day of **January, 1975**

NOTARY PUBLIC

MARY L. AVENT,
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. Filed in Bronx County
Commission Expires March 30, 1975